Office Supreme Court, U.S.
FILED
APR 22 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 1038

MAY SPACH, Trustee,

Appellant,

versus

HERBERT M. FISHER, Bankrupt and
DRAKE OPERATING CO., INC.,

Appellees.

PETITION FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANK, WESTON and STRELKOW
Attorneys for Appellant
1335 Lincoln Road
Miami Beach, Florida

INDEX

		Page
I.	Reference to the Opinion Delivered Below	1
II.	Jurisdictional Grounds	2
III.	Question Presented for Review	2, 3
IV.	Federal Law Applicable To These Proceedings	3, 4
V.	Statement of the Case	4-6
VI.	Argument	6-12
	Conclusion	12

AUTHORITIES CITED

Statutes: Page

Act of Congress Relating to Bankruptcy:
- Section 24(c) 2
- Section 23(a) 3
- Section 2(a)(7) 4
- Section 39(c) 5
- Section 39(a)(8) 5
- Section 1(10) 6
- Section 2(a)(15) 6
- Section 24a 6
- General Order XLVII 12

Cases:
- Spach vs. Johnina, CCA, 5th Circ (1961) 291 F2d 619 ..... 7, 8

Texts:

Remington on Bankruptcy, Vol 5A:
- Sec. 2421 8
- Sec. 2422 9
- Sec. 2427 10

Collier on Bankruptcy, Vol. 2:
- Paragraph 23.07 11

American Jurisprudence, Vol. 6, Revised Ed:
- Sec. 1725 12

IN THE

Supreme Court of the United States

No. _____

MAY SPACH, Trustee,

Appellant,

versus

HERBERT M. FISHER, Bankrupt and
DRAKE OPERATING CO., INC.,

Appellees.

PETITION FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I

This petition is filed on behalf of the Appellant, May Spach, Trustee for the above named Bankrupt, for a Writ of Certiorari of the cause styled above to review a judgment entered by the United States Court of Appeals, Fifth Circuit in these proceedings. The opinion accompanying said judgment was delivered on November 28, 1962, and is appended to this Petition for Writ of Certiorari.

II

The judgment rendered by the United States Court of Appeals, Fifth Circuit affirmed an Order of the United States District Court, Southern District of Florida, Miami Division, dated December 8, 1961, said Order determining that the Appellee, herein was entitled to a plenary suit, and reversing the ruling made by the Referee in Bankruptcy. Said judgment was entered **Nov. 28, 1962**, and is reported at F.2d .

Appellant petitioned the United States Court of Appeals, Fifth Circuit, for a rehearing of the above styled cause and on January 17, 1963 the Petition for Rehearing was denied.

This Petition for Writ of Certiorari is taken pursuant to Section 24(c) of the Act of Congress relating to Bankruptcy (11 U.S.C. Sec. 47) which vests the Supreme Court of the United States with jurisdiction to review judgments of the United States Court of Appeals in proceedings under the Bankruptcy Act.

III

THE QUESTION

"HAS A REFEREE PROPERLY EXERCISED SUMMARY JURISDICTION PURSUANT TO SECTIONS 23(a) and 2(a)(7) OF THE BANKRUPTCY ACT AFTER:

(1) THE APPELLEE'S MOTION TO SET ASIDE AN ORDER TO SHOW CAUSE AND TO DISMISS PETITION FOR TURNOVER FAILS TO SET FORTH SUFFICIENT FACTS TO ESTABLISH AN ADVERSE CLAIM,

(2) THE REFEREE THEN DEFERS RULING ON APPELLEE'S MOTION AND PROCEEDS TO A PRELIMINARY EXAMINATION AND EXTENDED HEARING TO DETERMINE WHETHER A SECURITY DEPOSIT, THE SUBJECT MATTER OF THE TURNOVER PROCEEDINGS, IS IN THE CUSTODY OR CONSTRUCTIVE POSSESSION OF THE BANKRUPTCY COURT,

(3) THE REFEREE MAKES FINDINGS OF FACT DETERMINING THE SECURITY DEPOSIT TO BE AN ASSET OF THE ESTATE AND ENTERS AN ORDER OF TURNOVER IN ACCORDANCE WITH SUCH FINDINGS,"

(4) THE FINDINGS OF FACT OF THE REFEREE ARE SUBSTANTIATED BY THE RECORD?"

IV

The federal law applicable to these proceedings is:

Section 23(a), Act of Congress Relating to Bankruptcy— Jurisdiction of United States and State Courts.

(11 U.S.C. Sec. 46). "The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same

extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

Section 2(a), Act of Congress Relating to Bankruptcy —Creation of Courts of Bankruptcy and Their Jurisdiction. (11 U.S.C. Sec. 11)." The courts of the United States . . . defined as courts of bankruptcy . . . are hereby invested . . . with such jurisdiction . . . to exercise original jurisdiction in proceedings under this Act, . . .

(7) . . . and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed . . . , he shall be deemed to have consented to such jurisdiction."

V

STATEMENT OF THE CASE

In this Petition the following symbol will be used:

"T" for Transcript which refers to the printed Transcript of Record.

May Spach, Appellant, the duly qualified and acting Trustee for the Bankrupt, Herbert M. Fisher, petitioned the Bankruptcy Court on November 19, 1959, for an order requiring the turnover of a security deposit of $133,000 under a lease agreement. (T-3) The Bankrupt was assignee of the original Lessee and the Appellee, Drake Operating Co., Inc. was assignee of the original Lessor.

Appellant on November 20, 1959 petitioned the Court for an Order to Show Cause, directed to Appellee Drake, to appear and show cause why the Petition for Turnover should not be entered. (T-6)

On November 27, 1959 Appellee filed its Motion to Set Aside Order to Show Cause and Dismiss Petition for Turnover. (T-1)

On November 30, 1959, the Referee deferred ruling on Appellee's Motion and conducted a hearing to ascertain whether Appellee's claim contesting the Referee's summary jurisdiction was more than colorable. (T-12-153)

On the date of the Hearing aforesaid, Appellee tendered an Answer to the Petition for Turnover, subject to the Referee's determination on the Motion to Dismiss. (T-7, 13)

On September 6, 1961, the Referee made his Findings of Fact and in accordance therewith entered an Order directing Appellee to turn over the security fund. (T-153)

Thereafter, on September 15, 1961, Appellee petitioned for a Review of the above Order, and on October 9, 1961, the Referee entered his Certificate of Review (T-157, 163) pursuant to Section 39(c) and 39(a)(8) of the Bankruptcy Act, providing the procedure for Review of Orders entered by the Referee.

On December 8, 1961, The Honorable Emett C. Choate, Judge of the United States District Court, Southern District of Florida, Miami Division, pursuant to the authority vested in him by the Bankruptcy Act, Sections

1(10) and 2(a)(15), entered his Order reversing and setting aside the Referee's Order dated September 6, 1961. (T-165)

Appellant then filed a Notice of Appeal pursuant to Section 24a of the Bankruptcy Act to the United States Court of Appeals, Fifth Circuit, to review the Order entered by the United States District Judge, and on November 28, 1962, the United States Court of Appeals rendered its Judgment affirming the District Court Order. (T-167) (Judgment and opinion appended)

Thereafter, Appellant petitioned for a Rehearing to the United States Court of Appeals, Fifth Circuit, and on January 17, 1963, said Petition was denied.

Appellant now files this Petition for Writ of Certiorari to this Honorable Court to review the proceedings below.

VI

ARGUMENT

(1) THE MOTION TO SET ASIDE ORDER TO SHOW CAUSE AND TO DISMISS PETITION FOR TURNOVER

The opinion delivered by the United States Court of Appeals, Fifth Circuit, affirming the Order of the United States District Court, makes no reference to the Motion to Set Aside Order to Show Cause and to Dismiss Petition for Turnover. To the contrary, the opinion recognizes that such a motion was filed by the Appellee, Drake

Operating Co., Inc., but bypasses an inquiry into the allegations set forth in the Motion, and proceeds to discuss Appellee's Answer which was directed to the merits of the controversy (page 2 of the Opinion). In point of fact, the Motion filed by Appellee which was relied upon to contest the use of summary jurisdiction by the Referee was defective in that sufficient substantive facts were absent precluding a jurisdictional attack. The Opinion cites the case of **Spach vs. Johnina**, decided June 21, 1961, by the U. S. Court of Appeals, 5th Circuit (rehearing denied on September 13, 1961 (certiorari denied by U. S. Supreme Court) and reported at 291 F.2d 619, which supplies the procedural requirements necessary to make a jurisdictional attack of the Referee's summary jurisdiction, to-wit: Substantial facts must be alleged in a Motion to Quash to show a substantial claim. (Page 7 of the Opinion in **Spach vs. Fisher**

The United States Court of Appeals, Fifth Circuit, stated in **Spach vs. Johnina** at page 5 of that Opinion (a copy of which is appended to this Petition):

> "It appears that the District Court, in entering its Order of reversal, assumed that the allegations contained in the answer of Johnina, Inc., were asserted in the motion to quash. If they had been so alleged we would agree with the trial court that the Referee did not have jurisdiction for summary order. However, this is not what is disclosed by the record before us, and we must, therefore, find that the trial court erred in reversing the order of the Referee retaining jurisdiction over the matter."

And at page 4 of the same Opinion, the Appellate Court stated:

> "Thus the burden was on the landlord to prove the amount of his actual damages, once it was clear that the Referee had acquired jurisdiction over the issue by failure of the appellee, in its motion to quash, to assert any factual basis for its claim."

It is noteworthy that the Motion to Set Aside Order and to Dismiss Petition filed by the Appellee herein, provides less of a factual basis, if any at all, in setting forth its adverse claim, than the factual framework presented in the Motion to Quash in the **Spach vs. Johnina** case, supra.

> "Where . . . possession is in the respondent and he wishes to retain it and rely on his right to plenary suit as an adverse claimant in possession, it is important . . . that he do not answer, or that he answer with care, in order to prevent waiver of such rights.
>
> "(The) effect of the Amendment (Sec. 2(a)(7) of the Bankruptcy Act) . . . as far as objecting to summary jurisdiction of the Bankruptcy Court . . . is concerned, the objection must come as by statute now prescribed; otherwise it is waived." (**Remington on Bankruptcy, Vol. 5 A, Sec. 2421**)
>
> "As to the manner of stating the objection, it should of course, be specific and informative. Where the basis of the objection is that re-

spondent is an adverse claimant of the property in question, was in possession thereof prior to Bankruptcy, and is entitled to retain it until or unless otherwise determined in a plenary suit, the facts should be set forth.

" . . . If a merely vague answer setting up status as an adverse claimant and asserting the right to plenary suit is interposed, the Trustee and the Referee may go into the basis of the claim; . . . ." (**Remington on Bankruptcy, Vol. 5A, Sec. 2422**)

(2) THE PRELIMINARY EXAMINATION TO DETERMINE IF THE SUBJECT MATTER OF THE TURNOVER PROCEEDING IS IN THE CUSTODY OR CONSTRUCTIVE POSSESSION OF THE BANKRUPTCY COURT

At the hearing on November 30, 1959, before the Referee to determine the Trustee's right to a turnover order, the Referee deferred ruling on Appellee's Motion to Set Aside Order and to Dismiss Petition for Turnover, with leave for Appellee to submit an Answer subsequent to the ruling on the Motion. (T-12, 13) The Referee then entered into preliminary examination to determine whether Appellee's claim to the security deposit was more than colorable.

The United States Court of Appeals' opinion in these proceedings recites cases emphasizing the well reasoned rule that when findings from preliminary inquiry show an adverse possession prior to Bankruptcy under a claim

of right or otherwise and not merely colorable, the proceedings for turnover should be dismissed and a plenary suit initiated by the trustee. This rule cannot be disputed, but the Court's citation of cases concerning the application of this proposition to the present proceedings presupposes that the Referee's findings of fact determined the claim of Appellee to be more than colorable and founded on some claim of right asserted in good faith by a timely motion to quash. Such a finding was not made by the Referee. The Court cannot take the position of a belated factfinder but must confine its duty to the task of determining whether the facts as found by the Referee, and not those facts merely alleged in Appellee's Motion and Answer, support the right of the Referee to entertain summary proceedings.

> "(I)f a right to retain possession is asserted by the Respondent, by virtue of an adverse claim to the property and possession running back to before the filing of the Bankruptcy petition, this raises a preliminary issue for determination by the Bankruptcy Court before proceeding further. There is no question but that the Court or Referee has power to pass upon such an objection, though it is equally well settled that the merits of the adverse claim cannot be gone into, but only whether it has some reasonable basis in law if established as Respondent credibly claims to be able to establish it." (**Remington on Bankruptcy, Vol. 5A, Sec. 2427**)

> "A necessary corrollary to these principles is that in all proceedings to recover summarily the possession of property from the hands of third

persons, there is preliminary jurisdiction to inquire into the nature of the defendant's possession and into any adverse claim so far as to see whether it is more than colorable. In other words it becomes necessary for the Court to determine as to the substantiality of the adverse claim, if any, prior to assuming summary possession of the property and for this reason the Court may make its inquiry into the basis of the claim. The mere assertion of an adverse claim is not enough to prevent the exercise of summary jurisdiction by the Bankruptcy Court." (Colliers, Vol. 2. Para 23.07, p. 521)

(3) THE FINDINGS OF FACT BY THE REFEREE AND HIS ENTRY OF TURNOVER

(4) THE FINDINGS ARE SUBSTANTIATED BY THE RECORD

On September 6, 1961, the Referee made his Findings of Fact and entered a Turnover Order requiring the Appellee to surrender the proceeds of the security deposit. (T-153)

Appellee contends that the Referee overstepped the limits of his jurisdiction by inquiring into the facts and circumstances surrounding the disposition of the security deposit. In order to determine whether Appellee's claim was adverse or colorable, preliminary hearing was undertaken, all parties appeared before the Referee and all issues were fully and fairly presented for his determination. Appellee had the opportunity to develop its contentions in protesting the exercise of summary jurisdiction

as set forth in its Motion. Findings were made as substantiated by the record (T-12-153), reflecting that Appellee's claim did not prove to be adverse, and supporting the Trustee's right to a turnover Order. (T-154-157)

> "The judge shall accept findings of fact made by the Referee unless they are clearly erroneous. Such findings should not be disturbed on appeal if supported by substantial evidence." (**Amer. Juris., Vol. 6, Rev'd Ed., Sec. 725; Bankruptcy Act, Gen. Order XLVII**)

CONCLUSION

It is submitted that this Honorable Court should grant Petitioner's request for Writ of Certiorari to eliminate the confusion and direct conflict existing by reason of the Opinions rendered by the United States Circuit Court of Appeals, Fifth Circuit, in the proceedings herein and in the case of **Spach vs. Johnina.**

FRANK & WESTON

By _____
Attorneys for Appellant

CERTIFICATE OF SERVICE

I do hereby certify that copies of the foregoing Petition were furnished to Jepeway & Gassen, 101 E. Flagler St., Miami, Fla., and Broad & Cassel, 420 Lincoln Rd., Miami Beach, Fla., attorneys for appellee.

FRANK & WESTON

By

RARY
COURT, U.S.

Office-Supreme Court, U.S.
FILED
APR 22 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 1038

MAY SPACH, Trustee.
Appellant,

versus

HERBERT M. FISHER, Bankrupt and
DRAKE OPERATING CO., INC.,
Appellees

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

FRANK, WESTON and STRELKOW
Attorneys for Appellant
1335 Lincoln Road
Miami Beach, Florida

INDEX TO APPENDIX

		App. Page
I	ORDER DIRECTING TURNOVER, entered September 6, 1961 by the Honorable J. E. Booher, Referee in Bankruptcy	1
II	ORDER REVERSING REFEREE'S ORDER, entered December 8, 1961 by the Honorable Emett C. Choate, United States District Judge	6
III	OPINION RENDERED November 28, 1962, by United States Court of Appeals for the Fifth Circuit	7
IV	JUDGMENT RENDERED November 28, 1962, issued February 12, 1963, by the United States Court of Appeals for the Fifth Circuit	16
V	ORDER DENYING PETITION FOR REHEARING entered January 17, 1963, by the United States Court of Appeals for the Fifth Circuit	18

CERTIFICATE OF SERVICE

IN THE

Supreme Court of the United States

No.

MAY SPACH, Trustee,

Appellant,

versus

HERBERT M. FISHER, Bankrupt, and
DRAKE OPERATING CO., INC.,

Appellees.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

I

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION
IN BANKRUPTCY

NO. 4253—M

IN RE:
HERBERT M. FISHER,
Bankrupt.

ORDER DIRECTING TURN OVER

THIS CAUSE having come on to be heard before me upon the Petition of MAY SPACH, Trustee herein, for

the entry of a Turn Over Order, and the Court having heard the testimony of the parties and argument of Counsel, and being otherwise duly advised in the premises.

THE COURT FINDS as follows:

1. MAY SPACH is the duly, qualified and acting Trustee of the above named Bankrupt.

2. That this Court has jurisdiction of the subject matter herein, and the parties hereto.

3. That the said Bankrupt, HERBERT M. FISHER, did receive, by Assignment from BENMIL, INC., a Florida corporation, that certain Lease dated the 17th day of June, 1954, by and between MIDCENTURY CORP., as Lessor, and BENMIL, INC., as Lessee. That the consideration for said Assignment being the payment of a sum in excess of ONE HUNDRED THIRTY THREE THOUSAND DOLLARS ($133,000.00). The said Lease provided for the establishment of a security fund in the sum of ONE HUNDRED THIRTY THREE THOUSAND DOLLARS ($133,000.00). Page 9 of the Lease, Paragraph 3 (g) provided that the Lessor gives and grants unto the Lessee a lien on the subject property for assurance of the return of the said security fund.

The said DRAKE OPERATING CO., a Florida corporation, succeeded to the interest of the Lessor, MIDCENTURY CORP., by virtue of an Assignment. The MIDCENTURY CORP., had been dissolved, and the Officers and Directors of the MIDCENTURY CORP., are also the same Officers and Directors of DRAKE OPERATING CO.

4. The Voluntary Petition in Bankruptcy was filed on the 3rd day of July, 1959, and within four (4) months prior to the filing of the Petition in Bankruptcy, to-wit: the 23rd day of June, 1959, the Bankrupt, without fair consideration released and transferred the subject lease together with the security fund to MALVIN ENGLANDER, as Trustee. That the said MALVIN ENGLANDER, as Trustee, was acting without disclosure for DRAKE OPERATING CO., the Respondent. (Hearing of November 30, 1959 -- Tr. 55)

5. The MIDCENTURY CORP., the predecessor in title of the demised premises, utilized approximately ONE HUNDRED THOUSAND DOLLARS ($100,000.00) of the ONE HUNDRED THIRTY THREE THOUSAND DOLLARS ($133,000.00) security fund to alter and improve the demised premises. (Hearing of June 14, 1960 -- Tr. 45. Although the said security fund has, in part, been absorbed in the realty improvements such change does not deprive, or preclude, the Trustee from pursuing the assets of this Estate by means of a Turn Over Proceeding. (6 Am. Jur., Sec. 1140, p. 1234)

6. The Respondent, DRAKE OPERATING CO., elected to terminate the subject Lease (Hearing of November 30, 1959 -- Tr. 31) and operate the hotel premises for its own account. This election thereby terminated the relationship of landlord and tenant, however, did not dispose of the question of the return of the security fund.

In spite of the termination of the subject Lease at the election of the Respondent the Respondent seeks to hold the Lessee liable for continuing damages. Even if the Respondent, Lessor, had not terminated the Lease the

Respondent did not attempt to mitigate its damages by offering the subject property for releting, but elected to operate said hotel for its own benefit. (Hearing of June 14, 1960 — Tr. 17, 22, and 53)

The testimony of the Respondent relating to alleged damages is based upon conjecture and speculation. The Florida Supreme Court in Ventilated Awning Co. v. Dax, 67 So.2d 215 held that in order for damages to be recoverable they must be clearly and fully shown so as to be ascertained with reasonable certainty. If the damages claimed are so conjectural and speculative a to be immeasurable pecuniarily no substantial recovery can be had therefor. (Farrington v. Richardon, 16 So.2d 158)

7. The Trustee has established, by the weight of the testimony, her right to the entry of a Turn Over Order.

8. That MALVIN ENGLANDER, ESQUIRE acted as Agent for WILLIAM SILVERSTEIN and DRAKE OPERATING CO. for the purpose of creating a Mortgage on the aforedescribed Leasehold interest. That the said MALVIN ENGLANDER failed to disclose his Agency relationship to the Bankrupt.

ORDERED, ADJUDGED AND DECREED that the Respondent, DRAKE OPERATING CO., Turn Over to the Trustee, MAY SPACH, the sum of ONE HUNDRED THIRTY THREE THOUSAND DOLLARS ($133,000.00) within ten (10) days from the date of this Order, and upon its failure to so do the Trustee have a lien for the sum of ONE HUNDRED THIRTY THREE THOUSAND DOLLARS ($133,000.00) on the real estate of the Re-

spondent known as the South Seas Hotel at 1751 Collins Avenue, Miami Beach, Dade County, Florida.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 6th day of September, A.D. 1961.

s/ J. B. BOOHER
REFEREE IN BANKRUPTCY

II

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION IN BANKRUPTCY.

NO. 4253-M

IN RE:
HERBERT M. FISHER,
Bankrupt.

ORDER REVERSING REFEREE'S ORDER

THIS CAUSE coming on to be heard upon the Petition of Drake Operating Co., Inc., a Florida corporation, for the review of the Order of the Referee in Bankruptcy entered herein on September 6, 1961, through which, among other things, the said Referee in Bankruptcy, ordered, adjudged and decreed that Drake Operating Co., Inc., a Florida corporation, as the respondent, turn over to the Trustee herein, May Spach, the sum of $133,000.00 within ten days from the entry of the said Order, and that, upon its, the respondent's, failure to do so, the Trustee have a lien for the sum of $133,000.00 upon the real estate of the respondent known as South Seas Hotel, at 1751 Collins Avenue, Miami Beach, Dade County, Florida, and the respective parties having filed their briefs and counsel for the said respective parties having appeared and argued the said Petition for Review before the Court and it appearing unto the Court that the respondent, Drake Operating Co., Inc., a Florida corporation, having seasonally raised the issue of the want of jurisdiction of this Court over it in this cause through its Motion to set aside the Order entered against it on November 20, 1959,

by the said Referee in Bankruptcy, and to dismiss the Petition of the Trustee upon which the said Order of November 20, 1959 had been entered upon the grounds set forth in the said Motion, and it appearing further to the Court that, notwithstanding the denial by the said Referee in Bankruptcy of the respondent's Motion to set aside the said Order entered against it on November 20, 1959, and to dismiss the Petition of the Trustee upon which the said Order was entered, the respondent, nevertheless, in its Answer again specifically objected to, and made an issue, of the jurisdiction of this Court over this respondent in this cause in this type of proceedings and reserved to itself its position in this regard, and protested and objected to the exercising of any jurisdiction by this Court over the respondent in these proceedings, and the Court having considered the briefs filed by the respective parties herein and the arguments of their attorneys and being of the opinion that this Court had no jurisdiction of the respondent, Drake Operating Co., Inc., in these proceedings sought herein by the said Trustee, and the Court being of the opinion, that upon the record, the Order of September 6, 1961, should be reversed, it is, accordingly,

ORDERED and ADJUDGED that the Order entered by the Referee in Bankruptcy herein on September 6, 1961, ordering, adjudging and decreeing that the respondent, Drake Operating Co., Inc., turn over to the Trustee, May Spach, the sum of $133,000.00 be, and the said Order is hereby, reversed, set aside and held for naught, and it is further,

DONE and ORDERED at Miami, Southern District of Florida, this 8th day of December, 1961.

EMETT C. CHOATE
UNITED STATES DISTRICT JUDGE

III

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19510

MAY SPACH, Trustee,

Appellant,

versus

HERBERT M. FISHER, Bankrupt and
DRAKE OPERATING CO., INC.,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

November 28, 1962

Before JONES and BELL, Circuit Judges and CARSWELL, District Judge.

BELL, Circuit Judge: Appellant, trustee in bankruptcy, petitioned the bankruptcy court for an order requiring the turnover of a security deposit of $133,000 under a lease agreement. The lease was assigned to the bankrupt and Michael J. Leibowitz by the original lessee. The appellee-respondent was the assignee of the original lessor.

The petition alleged that within four months prior to the filing of the voluntary petition in bankruptcy the bankrupt transferred the lease and security fund to appellee and others without fair consideration, thereby rendering the bankrupt insolvent, and that appellee had the proceeds of the security fund in its possession and had assets exceeding the amount of the security fund. Appellee by answer denied that it had the security fund, recited the fact of the lease, the assignment of it to the bankrupt and Leibowitz and the assumption of the obligations and requirements under it by them, their default in the payment of rent, a state court proceeding to terminate and evict them as tenants, an extension of time within which to pay the delinquent rent, failure to pay under the extension, and the release of the lessees of all obligations under the lease and the return of the leased property to the owner, all before the filing of the bankruptcy petition. Appellee alleged that past due rent at the time of the release totaled $21,000 and that the tenants were also indebted to appellee in the amount of $25,000 under a promissory note, and that substantial losses were suffered since the return of the property all of which losses substantially exceeded the amount of the security fund.

Appellee denied that the trustee was entitled to recover the security fund or any part thereof, and denied that the court had jurisdiction in the summary proceeding.

The lease provided for the security fund, and further provided that if it was cancelled for default in the payment of rent no part of the security fund would be returned to the lessee nor would the lessor be bound to account for any part of the fund, "the parties having taken

into consideration the difficulty and impracticability of precisely ascertaining the amount of damages to which lessor would be put if at some unknown time in the future the lessee should default in payment of the rental, and the parties stipulate, specify and agree that such security constitutes liquidated and agreed upon damages and is not, as a matter of [f]act, a penalty or a forfeiture".

The lessor was not to keep the security fund separate or in a segregated account, no interest was to be paid on the fund, and lessee was granted a lien on the interest of lessor in the demised premises. It was agreed that the fund might be used for the construction of an addition to the Hotel South Seas situated on the land under lease. The lease was for the term commencing on December 20, 1954 and terminating on September 30, 1962 and the total rental to be paid was $1,063,296.

The matter came on for hearing and the referee determined that the bankruptcy court had jurisdiction of the matter and the parties. His findings were to the effect that the lease provided a lien on the property to insure the return of the security fund, that the petition for bankruptcy was filed on July 3, 1959 and that on June 23, 1959 the bankrupt, without fair consideration, released and transferred the lease together with the security fund to a trustee acting without disclosure for appellee, the lease having previously been assigned to that trustee to secure a loan to the bankrupt and Leibowitz in the amount of $25,000. He went on to find that $100,000 of the security fund had been used to alter and improve the demised premises, that appellee elected to terminate the lease and operate the hotel for its own account, thereby terminating the relationship of landlord and tenant but not disposing of the

question of the return of the security fund. The referee held that the proof as to damages suffered by appellee was mere conjecture and speculation and insufficient under the Florida law to establish damages. He ordered that appellee turn over the entire security fund to the trustee within ten days, and failing so to do, the trustee would have a lien on the property for the amount of the fund.

The appellee petitioned for review both on the question of jurisdiction and on the merits. The referee certified as follows:

> "The evidence submitted in behalf of the Trustee, to-wit: The Lease Agreement, clearly reflects that the Respondent received the sum of One Hundred Thirty Three Thousand ($133,000.00) Dollars as security deposit, and said deposit was an asset of the Bankrupt Estate. The Respondent, Drake Operating Co., Inc., alleged that said security deposit was liquidated damages, however, the Respondent made its election by terminating the Lease Agreement, and could not attempt to hold the Bankrupt liable for continuing responsibility under the Lease subsequent to its termination.

The district court reversed on the basis that the bankruptcy court had no jurisdiction of appellee and set aside the turnover order. This appeal followed.

Appellant contends that this was a proper case for the exercise of summary jurisdiction by the bankruptcy court to the end of resolving the issue presented. This question is determinative on appeal and we do not reach

the merits of the controversy. Under our view appellee was entitled to a plenary hearing on the merits.

The law on the question is well settled in this circuit. In *B. F. Avery & Sons Co. v. Davis*, 5 Cir., 1951, 192 F. 2d 255, cert. den., 342 U. S. 945, 72 S. Ct. 559, 96 L. Ed. 703, a manufacturer took possession of farm machinery in the hands of a dealer eight days before the dealer was adjudicated a voluntary bankrupt. The dealer had fallen behind in settlements under a contract by which the manufacturer claimed it retained title to the machinery. The trustee in bankruptcy sought the return of the machinery or its value, and the Referee ruled for the trustee. The manufacturer protested the referee's summary jurisdiction insisting on a plenary suit. The court with reference to when property may be recovered in summary proceedings said:

> "This question has most often arisen in the so called 'turn over orders', but its answer in general depends on whether the property sought to be recovered was actually held in possession by or for the bankrupt at bankruptcy, or was held by an adverse claimant under a claim not merely colorable. Where a controversy arises as to whether there is such an adverse claim, the rule is that the referee can summarily enquire into it, and if it clearly appears that possession was in or for the bankrupt, and the adverse claim or right is only colorable, he may make a judgment accordingly; but if there be a possession before bankruptcy that was really adverse and asserted in good faith, the referee may not

adjudge its merits, but the trustee must seek relief by a plenary suit."

The court in that case went on to hold that the referee properly inquired preliminarily whether there was a preference, but upon finding that the manufacturer was in adverse possession prior to bankruptcy under a claim of right not merely colorable or put forth in bad faith, he should not summarily have adjudged the merits but should have left the claim pending before him, and directed the trustee to prosecute his plenary suit to establish and recover the preference. And on the duty of the referee to determine as a threshold question that the property claimed is in the actual or constructive possession of the bankruptcy court before exercising its summary jurisdiction, see also *Maule Industries, Inc. v. Gerstel*, 5 Cir., 1956, 232 F. 2d 294; and *Nicholas v. Cohn*, 5 Cir., 1958, 255 F. 2d 301.

We reiterated in *Nicholas v. Peter Pan Snack Shop*, 5 Cir., 1958, 256 F. 2d 349, that upon summary inquiry, if it appears that possession before bankruptcy is adverse and asserted in good faith, the referee may not adjudge the merits of the claim but the trustee must seek relief by plenary suit. The exception there but not here involved is where summary jurisdiction is based upon the consent of the adverse claimant. Chapter 2, Bankruptcy Act, §11 (a)(7), 11 USCA, § 11a(7).

In *Spach v. Johnina, Inc.*, 5 Cir., 1961, 291 F. 2d 619, cert. denied, 368 U.S. 985, 82 S. Ct. 599, 7 L. Ed. 523, the trustee sought the turn over of a lease security fund. The lessor-claimant moved to quash without alleging any supporting facts. The motion was overruled and the lessor

answered on the merits asserting past due rents. No proof was offered to establish the facts set out in the answer. The referee directed that the fund be turned over. The district court reversed on the ground that the referee did not possess summary jurisdiction in that the lessor had a substantial claim against the security fund. We reversed on the ground that no facts were alleged in the motion to quash to show a substantial claim. We stated that the facts alleged in the answer, if asserted in the motion, would have demonstrated that the referee did not have summary jurisdiction. There was no appeal from the ruling on the merits. See generally 2 Collier on Bankruptcy, 14th Ed. §§23.03 et seq.

Here, appellee duly asserted and preserved the point that the bankruptcy court was without jurisdiction. Sufficient facts were alleged to show an adverse claim asserted in good faith. Appellee then went further and proved facts showing the claim. The security fund had been released to appellee before the petition in bankruptcy was filed. It was being claimed as liquidated damages under the lease. The release came after default in rental payments, and upon request of the bankrupt and Leibowitz to be relieved of the burden of the lease. There was a substantial sum past due for rentals. There was a substantial loan secured by the lease. There was evidence of damage to appellee.

Furthermore, under the authority of *Hyman v. Cohen*, Fla., 1954, 73 So. 2d 393, a case involving a hotel lease with a similar security fund provision and a similar liquidated damages provision, there is the possibility of the security fund being awarded to appellee as liquidated

damages. A court on a plenary hearing must determine this question in the light of that case and the contrary authorities exemplified by *Stenor, Inc. v. Lester*, Fla., 1951, 58 So. 2d 673; that it is, instead, a penalty provision. That question is not before us but the facts are such as to lend credence to the contention of a good faith claim by appellee.

Under the circumstances, appellee was entitled to have the merits of the claim adjudicated in a plenary suit with the rights and remedies incident thereto. *Cline v. Kaplan*, 1944, 323 U. S. 97, 65 S. Ct. 155, 89 L. Ed. 97. The district court properly set aside the order of the bankruptcy court, and the judgment of the district court should be and is

AFFIRMED.

IV

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19,510

D. C. Docket No. 4253-M-Bkcy.

MAY SPACH, Trustee,

Appellant,

versus

HERBERT M. FISHER, Bankrupt, and
DRAKE OPERATING CO., INC.,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before Jones and Bell, Circuit Judges, and Carswell, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged and decreed that the appellant, May Spach, Trustee, be condemned to pay the costs of this cause in this Court in due course of the administration of the estate of the said bankrupt.

November 28, 1962

Issued: Feb. 13, 1963

V

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 19,510

MAY SPACH, Trustee

Appellant

v.

HERBERT M. FISHER, Bankrupt and
DRAKE OPERATING CO., INC.

Appellee

Appeal From the United States District Court
for the Southern District of Florida
(December , 1962)

Filed Jan. 17, 1963, U. S. Court of Appeals, Edward W. Wadsworth, clerk.

Before JONES and BELL, Circuit Judges and CARSWELL, District Judge

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is hereby DENIED.

CERTIFICATE OF SERVICE

I do hereby certify that copies of the foregoing Appendix to the Petition for Writ of Certiorari were furnished to Jepeway & Gassen, 101 E. Flagler St., Miami, Fla., and to Broad & Cassel, 420 Lincoln Road, Miami Beach, Fla., attorneys for Appellee, Drake Operating Co., Inc., this [illegible] day April, 1963.

FRANK, WESTON & STRELKOW
By Robert R. Frank

Office Supreme Court, U.S.
FILED
MAY 15 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 1038

October Term, 1962

MAY SPACH, Trustee,

Petitioner,

versus

HERBERT M. FISHER, Bankrupt, and
DRAKE OPERATING CO., INC.,

Respondents.

On Petition For a Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JOSEPH GASSEN
c/o Jepeway & Gassen
714 Dade Federal Building
101 E. Flagler Street
Miami 32, Florida
and
SHEPARD BROAD
c/o Broad & Cassel
420 Lincoln Road
Miami Beach, Florida
Counsel for Respondent,
DRAKE OPERATING CO., INC.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	3
STATUTES INVOLVED	4
STATEMENT OF THE CASE	4
ARGUMENT	5
CONCLUSION	9
CERTIFICATE OF SERVICE	10

CITATIONS

Cases	Page
B. F. Avery & Sons Co. v. Davis, 5 Cir., 1951, 192 F.2d 255, cert. den., 342 U.S. 945, 72 S. Ct. 559, 96 L. Ed. 703	2, 7
Cline v. Kaplan, 1944, 323 U.S. 97, 65 S. Ct. 155, 89 L. Ed. 97	2, 7
Hyman v. Cohen, Fla. 1954, 73 So.2d 393	9
Nicholas v. Peter Pan Snack Shop, 5 Cir., 1958, 256 F.2d 349	7
Spach v. Fisher, 310 F.2d 328 (1962)	6, 7
Spach v. Johnina, 291 F.2d 619	6, 7
Wisniewski v. United States, 353 U.S. 901	7
Statutes	
Section 24(c) of the Bankruptcy Act (11 U.S.C. Sec. 47)	2
28 U.S.C. Sec. 2101(c)	3, 6
Section 23(a) and 2(a)(7) of the Bankruptcy Act [11 U.S.C. Secs. 46(a) and 11(a)(7)]	3, 4
Texts	
§ 23.07, Volume 2 Collier on Bankruptcy	8
~~§ 2307, Volume 2~~	~~8~~
Remington on Bankruptcy, Volume 5A, § 2428	8

IN THE

Supreme Court of the United States

No. 1038

October Term, 1962

MAY SPACH, Trustee,

Petitioner,

versus

HERBERT M. FISHER, Bankrupt, and
DRAKE OPERATING CO., INC.,

Respondents.

On Petition For a Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Petitioner, May Spach, Trustee, seeks to have this Court review the judgment and opinion of the United States Court of Appeals, Fifth Circuit rendered and filed on November 28, 1962, reported at 310 F.2d 328 (1962) (App. III of Petition) which said judgment affirmed an Order of the United States District Court, Southern Dis-

trict of Florida, Miami Division, dated December 8, 1961, (App. II of Petition) reversing a ruling made by the Referee in Bankruptcy (App. I of Petition) and holding that the Respondent, Drake Operating Co., Inc., had seasonally raised the issue of the want of jurisdiction and that upon the record that the Referee's Order Directing Turnover be reversed, set aside and held for naught. In its written opinion of November 28, 1962, the United States Court of Appeals, Fifth Circuit held that the Appellee (Respondent here) was entitled to have the merits of the claim adjudicated in a plenary suit with the rights and remedies incident thereto, and in support thereof, relied upon **Cline v. Kaplan**, 1944, 323 U.S. 97, 65 S. Ct. 155, 89 L. Ed. 97, and **B. F. Avery & Sons Co. v. Davis**, 5 Cir., 1951, 192 F. 2d 255, cert. den., 342 U.S. 945, 72 S. Ct. 559, 96 L. Ed. 703.

The Order of the United States Court of Appeals, Fifth Circuit denying the Petition for Rehearing filed by the Appellant (Petitioner here) was entered January 17, 1963.

JURISDICTION

The Petitioner seeks to invoke the jurisdiction of this Court under Section 24(c) of the Bankruptcy Act (11 U.S.C. Sec. 47). However, the Petition for Writ of Certiorari to review the judgment from the United States Court of Appeals, Fifth Circuit was not filed in this Court until April 22, 1963, some ninety-five (95) days after the filing of the Order Denying the Petition for Rehearing in the United States Court of Appeals, Fifth Circuit on January 17, 1963. Therefore, this Court is without jurisdiction to consider the Petition for Writ

of Certiorari, by reason of 28 U.S.C. Sec. 2101 (c) limiting the time for filing such petitions to ninety (90) days.

Furthermore, the Petitioner has not complied with Rule 19 of the Revised Rules of the Supreme Court of the United States, in that the Petition for Writ of Certiorari does not set forth any special and important reason for the granting of the Petition; nor does it contend that the United States Court of Appeals, Fifth Circuit has rendered a decision in conflict with a decision of another court of appeals on the same matter; or decided an important state or territorial question in a way in conflict with applicable state or territorial law, or has decided an important question of federal law which has not been, but should be, settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

QUESTION PRESENTED

Whether the District Court and United States Court of Appeals, Fifth Circuit, correctly held that the Referee in Bankruptcy had improperly exercised summary jurisdiction in a Petition for Turnover under Section 23(a) and 2(a)(7) of the Bankruptcy Act, (11 U.S.C. Secs. 46(a) and 11(a)(7)) where:

(1) Respondent properly and timely interposed an objection to the summary jurisdiction of the court of bankruptcy on a Trustee's Pe-

tition for Turnover of a $133,000.00 security deposit retained by the Respondent-landlord upon bankrupt tenant's default under a lease prior to the bankruptcy; and, where,

(2) After a preliminary hearing it appeared that a real and substantial controversy exists and the applicable law supports the contention of the Respondent that it is entitled to retain the security deposit.

STATUTES INVOLVED

The pertinent provisions of the Bankruptcy Act, 11 U.S.C. Secs. 11(a)(7) and 46 are set forth in the Petition at pages 3 and 4.

STATEMENT OF THE CASE

May Spach, Trustee in Bankruptcy, Petitioner here, petitioned the bankruptcy court for an order requiring the turnover of a security deposit of $133,000.00, under a lease agreement in which the bankrupt was one of the lessees by way of assignment and which this Respondent, Drake Operating Co., Inc., was lessor by way of assignment.

Long prior to the filing of the bankruptcy proceedings the lessee was in substantial default under the terms and provisions of the lease, particularly with respect to the payment of rent obligations thereunder, and by June of 1959, there was an arrearage of rent in the sum of some $23,500.00, as reflected by Schedule A-1 of the bankrupt's schedules, and as testified to by the bankrupt.

Herbert M. Fisher (T 76). Therefore, at that time, prior to the bankruptcy, the Respondent, Drake Operating Co., Inc., as lessor, had a right to terminate the lease and repossess the premises under the terms and conditions of the lease. The necessity for taking court action was obviated by the lessee surrendering the premises prior to the bankruptcy.

The Respondent-landlord, Drake Operating Co., Inc., did timely and properly raise the question of lack of jurisdiction in and by the Motion to Set Aside Order and Dismiss Petition (T 1-2) and by its Answer (T 7-10).

The Trustee, Petitioner here, had initially petitioned for an Order to Show Cause against Midcentury Corp., as alleged lessor, but upon showing before the court at a hearing held November 17, 1959, that Midcentury Corp. had been dissolved and Drake Operating Co., Inc., had succeeded to the lessor's interest under the lease, the initial petition was dismissed and the answers stricken (T 12). The Trustee then filed the Petition for Turn Over Order naming Drake Operating Co., Inc., as Respondent, on November 18, 1959, (T 3-5) and the Referee entered his Order to Show Cause thereon on November 20, 1959, (T 6-7). The first hearing thereon was held November 30, 1959, (T 11 et seq.).

ARGUMENT

We think that this Court is without jurisdiction to consider the Petition for Writ of Certiorari filed herein by the Petitioner, by reason of its not having been filed within the time permitted by the jurisdictional statute.

to-wit: 28 U.S.C. Sec. 2101 (c), as set forth in the section on Jurisdiction hereinabove.

(1) The Respondent, Drake Operating Co., Inc., properly and timely interposed an objection to the summary jurisdiction of the bankruptcy court of the Trustee's Petition for Turnover of the $133,000.00 security deposit retained by it. It filed its Motion to Set Aside Order and Dismiss Petition (T 1-2) and its Answer (T 7-10) prior to any hearing on the merits having been held, in and by which said motion and answer the facts and law upon which it relied were set forth. This conclusively defeats any argument that the Respondent, Drake Operating Co., Inc., had consented to the jurisdiction of the bankruptcy court under Sections 23(a) and 2(a)(7) of the Bankruptcy Act (11 U.S.C. Secs. 46(a) and 11(a)(7)).

The Petitioner in her Petition for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, does not cite any decision of any United States court of appeals of any other circuit or of the Supreme Court of the United States in conflict with the decision of the United States Court of Appeals, Fifth Circuit, attempted to be reviewed here, to-wit: **Spach v. Fisher**, 310 F.2d 328 (1962).

On the contrary, the Petitioner argues only that the decision in **Spach v. Fisher** is seemingly in conflict with the decision and opinion of the same Fifth Circuit in the prior case decided by it on June 21, 1961, to-wit: **Spach v. Johnina**, 291 F.2d 619.

However, the United States Court of Appeals, Fifth Circuit says in **Spach v. Fisher**, 310 F.2d 328, at page 330:

"Under our view appellee (Respondent here) was entitled to a plenary hearing on the merits. The law on the question is well settled in this circuit." As authority it cites **B. F. Avery & Sons Co. v. Davis,** *supra*, and further on page 330:

> "We reiterated in Nicholas v. Peter Pan Snack Shop, 5 Cir., 1958, 256 F. 2d 349, that upon summary inquiry, if it appears that possesion before bankruptcy is adverse and asserted in good faith, the referee may not adjudge the merits of the claim but the trustee must seek relief by plenary suit. The exception there but not here involved is where summary jurisdiction is based upon the consent of the adverse claimant. Chapter 2, Bankruptcy Act, § 11, sub. a(7), 11 U.S.C.A. § 11, sub. a(7)."

It then goes on to distinguish factually its decision in **Spach v. Johnina.**

Even if **Spach v. Johnina** were not clearly distinguishable from the instant case, **Spach v. Fisher,** it is well settled that a conflict within a circuit is not a basis for the granting of a Petition for Writ of Certiorari by the Supreme Court. **Wisniewski v. United States,** 353 U.S. 901. The decision of the United States Court of Appeals, Fifth Circuit, in this case not only is not in conflict with any decision of this Court but relies upon, and follows the decision of this Court in **Cline v. Kaplan,** *supra.*

The leading bankruptcy text writers agree that the decision of this Court in **Cline v. Kaplan,** and therefore

the decision of the United States Court of Appeals, Fifth Circuit, attempted to be reviewed in and by the petition here, represents the proper interpretation of the Bankruptcy Act. In **Remington on Bankruptcy**, Volume 5A, § 2428, it states:

> "The issue raised by objection that respondent is entitled to plenary suit is the narrow one of whether or not he has more than a merely colorable claim to the property. If he has, the bankruptcy court can proceed no further as against the objection. It is not its function, or within its jurisdiction, to pass upon whether the claim should or would prevail if fully litigated, but only upon whether the objector is entitled to have it litigated by ordinary action or plenary suit."

Collier on Bankruptcy, 14th Edition, is in agreement. Among other things, in § 23.07, Volume 2, it states:

> "Whether or not a claim is adverse so as to defeat summary jurisdiction depends upon whether the claim is substantial and real, or merely colorable. An adverse claim is substantial if the evidence offered as a basis is sufficient, if uncontroverted, to establish the validity of the claim; but a claim is not to be deemed merely colorable, so as to give the bankruptcy court summary jurisdiction, if its validity depends upon disputed facts as to which there is a conflict of evidence as well as a controversy in matter of law. It is now well settled that if there is a real and substantial controversy of

law or fact as to property held adversely to a bankrupt — 'a contested matter of right, involving some fair doubt and reasonable room for controversy' — the bankruptcy court is 'without jurisdiction' to adjudicate the matter, but the trustee must have resort to a plenary suit."

(2) A real and substantial controversy does exist as to whether or not the Respondent, Drake Operating Co., Inc., is entitled to retain the $133,000.00 security fund in its possession and the applicable law supports its contention that it is so entitled.

Under the authority of **Hyman v. Cohen**, Fla. 1954, 73 So.2d 393, which expressly overruled and modified all previously decided Florida cases in conflict with it, the Respondent would be entitled to retain the security fund. The United States Court of Appeals, Fifth Circuit, cited that case but did not decide that issue, holding instead that a court on a plenary hearing must determine this question.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH GASSEN
Counsel for Respondent,
Drake Operating Co., Inc.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing Brief has this 24th day of May, 1963, been mailed to FRANK, WESTON & STREEKOW, Attorneys for Petitioner, May Spach, Trustee, 1335 Lincoln Road, Miami Beach, Florida, and to PHILLIPS & PHILLIPS, Attorneys for Respondent, Herbert M. Fisher, Bankrupt, Seybold Building, Miami, Florida. I further certify that all requirements of Supreme Court Rule 33 (1) have been followed.